Supreme Court, U. S.
FILED
FEB 13 1976
MICHAEL RODAK, JR., CLERK

No. 75-746

In the Supreme Court of the United States

OCTOBER TERM, 1975

ATLAS ROOFING COMPANY, INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

WILLIAM J. KILBERG,
Solicitor of Labor,
Department of Labor,
Washington, D.C. 20210.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-746

ATLAS ROOFING COMPANY, INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the administrative enforcement mechanism of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 *et seq.*, violates the Sixth Amendment to the Constitution because the civil penalties it authorizes are "penal in nature" but are imposed without constitutional protections such as trial by jury. Assuming that such penalties are in fact civil, petitioner contends that the enforcement procedures violate the right to trial by jury guaranteed by the Seventh Amendment to the Constitution.

1. Petitioner, a roofing contractor with its office in Atlanta, Georgia, was engaged in the construction of a large warehouse roof in North Carolina in June 1972 when one of its employees fell to his death through a roof opening not protected by guardrails or proper covers (Pet. App. 3a, 27a; 1b-13b). As a result of this fatality, the Secretary

of Labor inspected the worksite and cited petitioner for a serious violation of the Occupational Safety and Health Act,[1] ordered the violation to be abated immediately, and proposed a civil penalty of $600. Petitioner timely contested this citation and proposed penalty before an administrative law judge of the Occupational Safety and Health Review Commission, who in May 1973 affirmed the Secretary's citation and held that the proposed penalty was "appropriate and reasonable" (Pet. App. 3a-4a; 1b-3b). The judge's decision became the Commission's final order when no Commissioner directed review. 29 U.S.C. 661(i).

2. Petitioner sought judicial review in the United States Court of Appeals for the Fifth Circuit, which unanimously upheld the administrative findings and rejected petitioner's contentions that the enforcement provisions of the Act violated the Sixth and Seventh Amendments (Pet. App. 1a-27a; 518 F.2d 990). After an extensive analysis of the factors set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, the court of appeals concluded that the civil penalties authorized by the statute are remedial rather than punitive and that they serve as a reasonable adjunct to the primary purpose of the Act—the speedy abatement of dangers to employee safety (Pet. App. 12a-25a). The court also dismissed petitioner's Seventh Amendment claim, relying upon the repeated pronouncements of this Court that the right to a jury trial is inapplicable to administrative proceedings (Pet. App. 25a-26a).

---

[1]29 U.S.C. 654(a)(2) requires all employers affecting interstate commerce to "comply with occupational safety and health standards promulgated under this Chapter." The pertinent standards, 29 C.F.R. 1926.500(b)(1) and (f)(5)(ii), require roof openings to be protected by specified guardrails or covers to prevent falls. See also 29 C.F.R. 1926. 502(b).

3. Petitioner's claims are identical in all respects to those raised by the same counsel representing petitioner Frank Irey, Jr., Inc., in No. 75-748. For the reasons stated in our brief in opposition in No. 75-748, we respectfully submit that the petition for a writ of certiorari should be denied.[2]

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,
Department of Labor.

FEBRUARY 1976.

---

[2]We note that here, as in No. 75-748, petitioner's principal contention that the Act's civil willful penalties are criminal in nature (Pet. 10-12, 17-18) is not presented because petitioner was cited only for a serious violation. Furthermore, petitioner's related contention (Pet. 14, n. 9) that the Secretary's OSHA Manual requires that serious penalties be based upon the "degree of the employer's wrongdoing" is supported neither by the portion of the Manual cited nor by any other part of the Manual.